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Supreme Court of the United States

OCTOBER TERM, 1933

No. 531

LEO NEBBIA, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

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Index to Subject Matter of This Brief

	Page
Reference to official report of opinion below	1
Concise statement of jurisdictional grounds	1
Concise statement of the case	2
Summary of the Milk Control Act	3
Summary of Order No. 5 of the Milk Control Board	6
Specification of the Assigned Errors to be urged	8
Summary of the Appellant's argument	8
Point I—Statutes similar to that here in question have repeatedly been held to be violative of the Fourteenth Amendment in attempting to fix prices for common commodities or services	10
Point II—The Milk Control Law, as applied by Order No. 5 of the Milk Control Board, discriminates unfairly against Nebbia as a cash and carry dealer in milk	18
Footnote analyzing certain findings of the "Report of the Joint Legislative Committee to Investigate the Milk Industry"	19
Point III—The economic depression now affecting the dairy farmers of New York does not suspend the operation of the Fourteenth Amendment	22

Table of Cases Alphabetically Arranged

	Cited Pages
Adkins v. Children's Hospital (1923), 261 U. S. 525; 67 L. Ed. 785	8, 15, 16
Block v. Hirsch (1921), 256 U. S. 135; 65 L. Ed. 865	9, 24, 26
Brown Holding Co. v. Feldman (1921), 256 U. S. 170; 65 L. Ed. 877	9, 24, 26
Court of Industrial Relations v. Wolff Packing Company (1922), 111 Kansas, 501, 509	26
Fairmont Creamery Co. v. Minnesota (1927), 274 U. S. 1; 71 L. Ed. 893	2, 8, 17
International Harvester Co. v. Kentucky (1914), 234 U. S. 216; 58 L. Ed. 1284	22
Milligan, Ex Parte (1866), 71 U. S. (4 Wall.) 2, 120; 18 L. Ed. 281, 295	9, 23
New State Ice Co. v. Liebmann (1932), 285 U. S. 262; 76 L. Ed. 747	9, 14
People v. Nebbia (1933), 262 N. Y. 259, R 13	1, 19
Ribnik v. McBride (1928), 277 U. S. 350; 72 L. Ed. 913.	17
Sterling v. Constantin (1932), 287 U. S. 378; 77 L. Ed. 254	9, 24
Tyson v. Banton (1926), 273 U. S. 418; 71 L. Ed. 718.	8, 17
United States v. Cohen Grocery Co. (1921), 255 U. S. 81; 65 L. Ed. 516	9, 24
Williams v. Standard Oil Co. (1929), 278 U. S. 235; 73 L. Ed. 287	8, 10, 11
Wilson v. New (1917), 243 U. S. 332; 61 L. Ed. 755.	24, 26
Wolff Packing Company v. Court of Ind. Rel. (1923), 262 U. S. 522; 67 L. Ed. 1103	8, 10, 17, 25, 27

Table of Statutes

	Cited pages
Agriculture and Markets Law of New York, Art. 25, §§ 300-319 (Milk Control Law); N. Y. Laws, 1933, Ch. 158; this brief, Appendix, page 29 ..... 2, 3, 4, 5, 6, 7, 8, 11, 13, 14, 15, 16, 18,	22
Judicial Code, § 237; Act. Feb. 13, 1925, Ch. 229, § 1; 43 Stat. 937, as amended; Act Jan. 31, 1928, Ch. 14, § 1; 45 Stat. 54; Act April 26, 1928, Ch. 440, 45 Stat. 466	1
Kansas Industrial Relations Act, Ch. 29, Laws of Kansas, Special Session 1920, page 35	35
Minimum Wage Law, District of Columbia, Act Sept. 19, 1918; 40 Stat. at L. 960, Ch. 174	15
New York Civil Practice Act, § 1011 A (Emergency Rent Law)	13
Public Acts of Tennessee (1927), Ch. 22, page 53	10
Report of Joint Legislative Committee to Investigate Milk Industry, April 10, 1933; 1933 N. Y. Legislative Document No. 114—Referred to and analyzed page ..... 19 et seq.	

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REFERENCE TO OFFICIAL REPORT OF OPINION BELOW

No opinion was written or reported below except the prevailing and dissenting opinions of the Court of Appeals of New York, reported 262 N. Y. 259, as

The People of the State of New York, Respondent, vs. Leo Nebbia, Appellant.

CONCISE STATEMENT OF JURISDICTIONAL GROUNDS

This is an appeal as of right under § 237, Judicial Code,[1] from a judgment of the Court of Appeals of the State of New York, dated July 11, 1933. The judgment affirmed the conviction of the appellant in a lower court of New York for

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[1] Act Feb. 13, 1925, Ch. 229, § 1, 43 Stat. 937, as amended; Act of January 31, 1928, Ch. 14, § 1; 45 Stat. 54; Act of April 26, 1928, Ch. 440; 45 Stat. 466.

a violation of a New York statute, called the Milk Control Law.[1]

This statute purports to fix, through Orders of a Milk Control Board, the minimum retail price of milk sold in New York. The appellant has contended in all courts that the statute, and the order of the Milk Control Board (R 2) under which he was convicted, conflict with the 14th Amendment to the United State Constitution. (R 10, 11, 12, 17). The petition for appeal (R 6) was presented to the Chief Judge of the New York Court of Appeals on August 31, 1933.

The jurisdiction here asserted was recognized by this Court in

Fairmont Creamery Co. v. State of Minnesota (1927), 274 U. S. 1; 71 L. Ed. 893.

Probable jurisdiction was noted herein by this Court October 23, 1933.

CONCISE STATEMENT OF THE CASE

This case originated with an Information in City Court, Rochester, N. Y. (R 1) charging that Leo Nebbia, the appellant, sold to one Jedo-Del Signore on April 19, 1933, two quarts of milk and a loaf of bread for 18c, in violation of §312 (E) of the Agriculture and Markets Law of the State of New York, inasmuch as the Milk Control Board had fixed the minimum retail price of milk at nine cents per quart.

Nebbia was arraigned, pleaded not guilty (R 10), was tried, convicted on May 26, 1933, and fined. At the opening

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[1] Article 25, Agriculture and Markets Law of New York, §§ 300-319; Ch. 158 Laws of 1933; see the Statute reprinted in full in the Appendix, page 29 of this brief.

of the trial his counsel demurred to the information, and moved that the information be dismissed, urging, among other grounds, that the statute and order under which the information was brought were invalid under the Fourteenth Amendment to the Federal Constitution. At the close of the trial, defendant renewed these motions and his demurrer (R 12); and after conviction he moved in arrest of judgment on the same grounds (R 12). All these motions, and the demurrers, were denied and overruled with exceptions to defendant. Nebbia paid his $5.00 fine under protest.

By appropriate steps the defendant appealed to the Monroe County Court, where on June 8, 1933, his conviction was affirmed (R 3). Thereupon he appealed to the Court of Appeals (R 4) upon a certificate of the Presiding Justice, Appellate Division, Fourth Department, that a question of law was involved which ought to be reviewed by the Court of Appeals. The Court of Appeals on July 11, 1933, gave judgment affirming the judgment of the County Court (R 28). The prevailing opinion of the Court of Appeals was delivered by Chief Judge Pound (R 13) and Associate Judge O'Brien delivered a dissenting opinion (R 23).

A Summary of the Milk Control Act

The Statute under which the conviction was had is long and complex. It is set forth in full at page 29 of this brief. A condensed analysis of its provisions may prove useful here.

The Act[1] begins with an elaborate statement (§ 300, this brief, page 30) to the effect that unhealthful and uneconomic trade practices obtain in the milk business in New

[1] Chapter 158, New York Laws of 1933, Article 25, Agriculture and Markets Law, §§ 300-319; this brief, page 29.

York, whereby the constant supply of pure milk to the people is imperiled, and "in order to preserve the strength and vigor of the race" the milk business is declared to be one affecting the public health and interest. The section goes on to refer to "the present acute economic emergency" which it ascribes in part to a disparity in price between milk and other commodities, and concludes that public supervision and control are immediately necessary. Much of the phraseology of this preamble is borrowed from opinions of the United States Supreme Court in cases construing the Fourteenth Amendment, with the obvious effort to avoid its effect in this case.

The Act then (§ 301, this brief, page 31) defines the classes of persons with whose conduct it deals; principally as follows:

> "'Milk dealer' means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state except when consumed on the premises where sold.
>
> 'Producer' means a person producing milk within the State of New York."

§ 302, (this brief, page 32), of the Act then creates a Milk Control Board of three members,—the Commissioner of Agriculture and Markets, the Commissioner of Health, and the Director of the Milk Control Board. Of these, the first two may designate deputies to perform their functions. A majority of the members of the Board carries the power to decide any question before the Board.

This Board is granted most extraordinary powers by the Act.

> (§ 312, this brief, page 41). It *must* fix by order the minimum wholesale and retail prices for milk handled within the state for fluid consumption, in-

cluding the prices on sales by milk dealers to consumers: this includes dealers who run stores (unless the milk is consumed on the premises). In fixing the prices it must take into consideration the amount necessary to yield a "reasonable return" to the producer and the milk dealer.

It may similarly fix maximum prices if it sees fit. § 304 gives rulings of the Board the force and effect of law.

(§ 308, this brief, page 36). The Board has power to issue or withhold a license, as a condition of continuance in business, to or from any milk dealer in the state. Certain classes it may or may not exempt from the license requirements,—such as small dealers and "carry away" stores. No unlicensed dealer (unless exempted) may sell or buy milk, or handle milk previously handled in violation of the Act.

(§ 308-3, this brief, page 37). The Milk Control Board may refuse, suspend or revoke a license (thereby putting the dealer out of business) if a dealer

(a) has been receiving from a producer shipments of milk in a course of dealing and then rejects a shipment "without reasonable cause".

(b) has failed "without reasonable cause" to pay a milk bill to a producer.

(c) where the dealer has done an act "in demoralization of the price structure of pure milk".

(d) where the dealer assigns for creditors, goes through bankruptcy, or has an execution returned unsatisfied against him.

(h) where the dealer fails to furnish information or keep records required by the board.

(k) where the licensee has violated any of the provisions of this article.

(§ 306, this brief, page 35), gives the Board sweeping powers to examine all books and records to enable the Board to administer the Act.

Beside the power given to the Board (by § 308, this brief, page 36) to enforce the Act by barring from the milk business any person who fails to comply, there is provided by § 307 an additional criminal

sanction. A violation of the article, or of a rule or order of the Board lawfully made, is made a misdemeanor, punishable by a year's imprisonment, one hundred dollars fine, or both. The Board may also proceed civilly at law, or may enjoin, without proof that a remedy at law does not exist (§ 307; page 35 herein).

The appellant considers it no unjust summary of this law to say that it first declares that milk has been selling too cheaply in the State of New York, and has thus created a serious situation; this situation is remedied by making the sale of milk at a low price a crime, punishable by a fine and a year's imprisonment; and the question of what is a low price is determined by the majority vote of three officials. As an aid in enforcing the rate regulation, the milk industry in the State of New York is made a public utility until March 31, 1934, and the Board can exclude from the milk business any violator of the statute or the Board's orders.

The fixing of minimum prices is the main feature of the Act; its other provisions are ancillary to that master purpose.

A Summary of Order No. 5, of the Milk Control Board

The Milk Control Board created by the Statute, on April 14, 1933, made the Order (R 2) fixing prices, which the appellant was charged below with disregarding. The order purported to set minimum prices for sales of milk and cream in all cities and villages of more than 1000 population, except for New York City and three neighboring counties.

A noteworthy feature of this order is the classification of prices. A "dealer" (defined by § 301, page 31, this brief, as "any person who purchases or handles milk within the state, for sale in this state, or sells milk within the

state except when consumed on the premises where sold") must charge a consumer at least 10c per quart of milk, and the dealer must charge a "store" at least 8c per quart and 5c per pint. (The Act, § 301, defines a "Store" as a "grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment". Apparently "stores" form a subordinate class within the larger class of "dealers".) The store must charge the consumer at least 9c per quart of milk. Dealers and stores alike must charge consumers the same minimum price for pints of milk,—6c.

Under the wide definition of a "dealer" falls that class of persons who have automobiles, wagons and other delivery facilities and bring milk to the customer's door. Nebbia, the appellant, however, who sold milk to his customers in his grocery store (R 11, 1), could only sell a quart of milk at one cent less than the price charged by a dealer who delivers milk to the consumer's door. If some customer wanted to buy "cash and carry," a pint of milk, Nebbia was obliged to charge him the same price for the pint as the customer would pay Nebbia's competitor for delivering the pint to the customer's door. Quite obviously under such an order Nebbia could not for an instant compete with the delivery service for pint business; and as a practical matter the one-cent difference allowed him for quarts of milk which he sold "cash and carry," is obviously entirely inadequate to permit competition with delivery service.

In brief, the statute and order have the effect of obliging Nebbia to pay 8c per quart and 5c per pint for his milk, entirely destroy his competitive advantage as a "cash and carry" dealer in pints, and go almost as far in destroying his competitive advantage as a cash-and-carry dealer in quarts.

SPECIFICATION OF THE ASSIGNED ERRORS TO BE URGED

The appellant respectfully represents to the Court that all eight of the assignments of error (R 7, 8) will be urged on the argument and in this brief. The substance of them all can be expressed very simply, as follows:—that the Statute,[1] and Order No. 5 of the Milk Control Board created by the Statute (R 2) deprived the appellant of his liberty and property without due process of law, and denied to him the equal protection of the laws in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States, and the New York Court of Appeals erred in not reversing the judgment of conviction on that ground.

SUMMARY OF ARGUMENT

The Statute and Order in question cannot be upheld unless the Federal Constitution has undergone profound changes since the United States Supreme Court decided

Adkins v. Children's Hospital (1923), 261 U. S. 525; 67 L. Ed. 785.

Wolff Packing Co. v. Court of Industrial Relations (1923), 262 U. S. 522, 67 L. Ed. 1103.

Tyson v. Banton (1926), 273 U. S. 418; 71 L. Ed. 718.

Fairmont Creamery Co. v. Minnesota (1927), 274 U. S. 1; 71 L. Ed. 893.

Williams v. Standard Oil Co. (1929), 278 U. S. 235; 73 L. Ed. 287.

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[1] Chapter 158, Laws of 1933, of the State of New York; Article 25 of the Agriculture and Markets Law, § 312-E; this brief, page 29.

New State Ice Co. v. Liebmann (1932), 285 U. S. 262; 76 L. Ed. 747.

The Statute attempts to apply the price-fixing feature of public utilities to the dairy business, which cannot constitutionally be so regulated.

The Statute, as applied to the appellant Nebbia by the Order (R. 2) of the Milk Control Board, discriminates unfairly against him as a "cash and carry" storekeeper, and deprives him of the equal protection of the laws, for it permits the dealer with a delivery service in substance to undercut the prices fixed by law for Nebbia; the order compels Nebbia to charge 6c per pint, and 9c per quart of milk sold over the counter, whereas his competitors are allowed to deliver to the customer's door pints of milk for the same price; and are allowed to deliver quarts at only a cent over the "cash and carry" price. Furthermore, under this order, Nebbia is obliged to pay 5c per pint and 8c per quart for his stock of milk, even though the person who supplies him is well content to receive 4c per quart and may profit handsomely at that price.

Nothing in the condition of the milk industry in the State of New York is such as to suspend the operation of the Fourteenth Amendment.

Ex Parte Milligan (1866), 71 U. S. (4 Wall.) 2; 18 L. Ed. 281.

United States v. Cohen Grocery Co. (1921), 255 U. S. 80; 65 L. Ed. 516.

Sterling v. Constantin (1932), 287 U. S. 378, 77 L. Ed. 254.

The housing cases, such as

Block v. Hirsch (1921), 256 U. S. 135; 65 L. Ed. 865,

and

Brown Holding Co. v. Feldman (1921), 256 U. S. 170; 65 L. Ed. 877,

do not support the constitutionality of the present statute and order. Those cases were based upon a scarcity of housing and a withholding of dwellings from the general public by landlords in an effort to exact an unreasonable rental. There is a vast difference between such a situation and the present, where in the words of Judge O'Brien (R 26) the markets are and, prior to the passage of this act, were flooded with a plethora of wholesome milk; and the Legislature, wishing to see deserving dairy farmers get more money for their product, has resorted (R 27) to the drastic remedy of fining or imprisoning small retail storekeepers who contract for the sale of milk at a price satisfactory to themselves and their customers.

Wolff Packing Co. v. Court of Industrial Relations (1923), 262 U. S. 522; 67 L. Ed. 1103.

Under the cases cited the judgment should be reversed.

POINT I

Statutes similar to that here in question have repeatedly been held to be violative of the Fourteenth Amendment in attempting to fix prices for common commodities or services.

Almost identical in its facts with the case at bar was

Williams v. Standard Oil Co. (1929), 278 U. S. 235; 73 L. Ed. 287.

There a Tennessee statute was called in question, which attempted to do for gasoline exactly what the statute here attempts to do for milk.

Public Acts of Tennessee (1927), Chapter 22, page 53.

This statute, like the Milk Control Act[1], starts out with a preamble which recites the private and public importance of the business concerned, recites that this business has become demoralized because of unfair and improper trade practices, and states that the sale and marketing of gasoline in Tennessee is impressed with a public use to preserve both public and private commerce and transportation.

To remedy these ills, the Statute created a Division of Motors and Motor Fuels, to be headed by a Superintendent. This officer was empowered to investigate the prices at which gasoline should be sold and to license applicants to sell at the price fixed. No person, firm or corporation was permitted to grant any rebate, concession or gratuity, directly or indirectly, to any customer to attract his business.

The similarity to the Milk Control Act is striking; the difference between the preambles of the two acts is purely one of rhetoric, not of substance.

The case[2] originated in the United States District Court, W. D., Tennessee, and resulted in a decree enjoining the state authorities from enforcing the statute. The United States Supreme Court affirmed[3], with an opinion by Mr. Justice Sutherland.

The opinion said, among other things[2]

> "It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services

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[1] Chapter 158, New York Laws of 1933; Article 25, Agriculture and Markets Law, §§ 300-319; this brief, page 29.

[2] *Williams v. Standard Oil Co.* (1929), 278 U. S. 235, 73 L. Ed. 287.

[3] *Ibid*, 278 U. S. 235, 239; 73 L. Ed. 287, 308.

rendered, or property used, unless the business or property involved is 'affected with a public interest'. * * * Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this court, beginning with Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect *granted* to the public. Tyson & Bro.-United Theatre Ticket Offices v. Banton, *supra*, p. 434 [71 L. Ed. 724, 58 A. L. R. 1236, 47 Sup. Ct. Rep. 426]. Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Id. p. 430. The meaning and application of the phrase are examined at length in the Tyson Case, and we see no reason for restating what is there said.

In support of the act under review, it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the state of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such

articles, irrespective of its extent, does not come within the phrase 'affected with a public interest'. Those decisions control the present case."

The application of this decision to the case at bar is so direct that it needs no elaboration. The only important point of difference lies in the clause in the New York Milk Control Act[1] which purports to end the powers of the Milk Control Board on March 31, 1934. At a later point in this brief there will be a fuller discussion of the asserted proposition that a State Legislature can successfully invade the rights guaranteed by the Fourteenth Amendment, provided the invasion is committed in installments of a year at a time. In this connection it is worthy of note, as stated in the Joint Motion to Advance herein, at page 2, that while the New York statute in question will expire by its terms on March 31, 1934, "it is probable that the Legislature which convenes soon after January first and ordinarily continues until some time in April will find it necessary either to continue this or to enact some other legislation to accomplish similar purposes". The New York Emergency Rent Laws were first passed in 1920, and continued as part of the Civil Practice Act until June, 1929.

New York Civil Practice Act, § 1011 A.

The prospect of re-enactment need not be stressed. A single year of interference with normal price differentials between a cash-and-carry storekeeper and a competing dealer who delivers milk, is plenty of time to turn the storekeeper's trade over to his competitor.

In several important cases construing the Fourteenth Amendment, the United States Supreme Court has selected

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[1]New York Laws of 1933, Ch. 158; Article 25, Agriculture and Markets Law, § 319; this brief, page 46.

dairying and conducting grocery stores as some of the best possible examples of essentially private businesses, to which the traditional "public utility" concept can not be applied.

In

New State Ice Company v. Liebmann (1932), 285 U. S. 262, 277, 76 L. Ed. 747, 753,

the United States Supreme Court says, in the prevailing opinion of Mr. Justice Sutherland, speaking of the ice business:

> "It is a business as essentially private in its nature as the business of *the grocer, the dairyman* (our italics), the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. * * *"

Again in the same opinion the Court says[1]

> "There is no difference in principal between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed."

The Milk Control Law,[2] here under discussion, was drawn with the *Ice* case before the author, for the preamble con-

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[1] *New State Ice Company v. Liebmann* (1932), 285 U. S. 262, 279; 76 L. Ed. 747, 754.

[2] New York Laws of 1933, Ch. 158, Article 25, Agriculture and Markets Law, §§ 300-319; this brief, page 29.

tains quotations from the opinion in the *Ice* case. In an effort to escape from the effect of that decision, the New York Legislature did not start out with a requirement that all new milk dealers obtain a "certificate of convenience and necessity". Instead the Legislature has proceeded to fix the minimum price of milk as though the supply were less than is actually the case. Obviously some persons, like Nebbia, will not be able to sell at the heightened price, inasmuch as there is an oversupply of milk for sale. To such a dealer the Legislature gives the alternative of voluntarily ceasing sales, or being obliged to cease under penal sanctions or injunctive process, or by being denied a license to carry on business. If enough people can thus be put out of the milk business, the effect will be the same as though a "certificate of convenience and necessity" were exacted as a condition of continuing to sell milk. The difference is one of form only. Under the *Ice* case[1], the "Public Utility" concept which the Legislature has attempted to apply to the New York milk industry, is unconstitutional.

> *Adkins v. Children's Hospital* (1923), 261 U. S. 525; 67 L. Ed. 785,

was a case arising under the Fifth Amendment, in which was called in question a statute[2] providing for the fixing, by a Board of three members, of minimum wages for women and children in the District of Columbia. The method of fixing the minima was strikingly like the method provided in the Milk Control Act[3] for fixing the minimum

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[1] *New State Ice Company v. Liebmann* (1932), 285 U. S. 262; 76 L. Ed. 747.

[2] Act of Sept. 19, 1918; 40 Stat. at L. 960, Ch. 174.

[3] New York Laws of 1933, Ch. 158, Article 25, Agriculture and Markets Law, §§ 300-319; this brief, page 29.

prices of milk. The Supreme Court held the statute unconstitutional. In the course of the prevailing opinion[1] the court stresses the fact that one of the principal faults of the statute providing for fixing the minimum wage is that

> "the declared basis * * * is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals".

Similarily in the case at bar, the laudable desire to see the dairy farmer happier and more prosperous has brought the New York Legislature to say that regardless of the retail value of milk as fixed by over-supply and limited demand, the dealer must sell to his customers at a fixed minimum, or else not sell.

If he does sell, under § 312 (c)[2] a dealer must "give fair and reasonable effect to the intent" of the legislature "that the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers". If he fails to live up to this vague standard, the dealer may have his license suspended or be proceeded against civilly and criminally.

In

> *Adkins v. Children's Hospital*, just cited (1923), 261 U. S. 525, 559; 67 L. Ed. 785, 797,

this Court further said,

> "Should a statute undertake to vest in a commission power to determine the quantity of food neces-

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[1] *Adkins v. Children's Hospital* (1923), 261 U. S. 525, 558; 67 L. Ed. 785, 796.

[2] New York Laws of 1933, Ch. 158, Article 25, Agriculture and Markets Law, § 312 (c); this brief, page 29.

> sary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed."

In the case at bar the New York Legislature has created a Board of three men to attempt to determine what prices for milk will yield the producer and dealer a reasonable return, and insure a supply of good milk; and makes underselling this price a jail offense. The relevance of the last quotation from the *Minimum Wage Case* is quite obvious.

No good purpose will be subserved by prolonging this part of the brief. Price or wage fixing by state statute has been found invalid by the Supreme Court in

Wolff Packing Co. v. Court of Industrial Relations (1923), 262 U. S. 522, 67 L. Ed. 1103. (Kansas statute regulating wages in the meat packing business during a declared "emergency".)

Fairmont Creamery Co. v. Minnesota (1927), 274 U. S. 1, 71 L. Ed. 893. (Minnesota statute forbidding a purchaser of dairy products to pay a higher price for the products in one locality than he paid in another.)

Tyson v. Banton (1926), 273 U. S. 418, 71 L. Ed. 718. (New York statute limiting the charge for theatre ticket brokerage to 50c.)

Ribnik v. McBride (1928), 277 U. S. 350; 72 L. Ed. 913. (New Jersey statute regulating rates charged by an employment agency.)

The price fixing features of the Milk Control Act[1] here under consideration falls with the other statutes mentioned. The contention that the State of New York is preserving the health, safety or morals of its people by fining or imprisoning storekeepers who sell milk for less than 9c per quart must fail, under established constitutional doctrine.

POINT II

The Milk Control Law,[1] as applied by Order No. 5 of the Milk Control Board,[2] discriminates unfairly against Nebbia as a cash and carry dealer in milk.

The Act here in question bears upon the appellant principally through the Order (R 2) of the Milk Control Board fixing prices. By that Order, Nebbia was required to pay to whatever dealer sold him his milk, 8c per quart and 5c per pint. It is noteworthy that no such lower limit was placed by Order No. 5 on a dealer other than a storekeeper,—on a dealer with a delivery route, for example.

Nebbia, having paid 8c per quart and 5c per pint to the dealer who supplied him, was obliged to resell over his counter at not less than 9c per quart and 6c per pint. Some rival in trade, having no store, but a wagon and delivery route, had no lower limit set for the price at which he was obliged to buy his milk; and was allowed to sell pints of milk as low as Nebbia, with delivery to the customer's door as a bonus. When delivering a quart of milk, the route-dealer had to charge only a cent more than Nebbia, a most inadequate differential.

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[1] Chapter 158, New York Laws of 1933, Article 25, Agriculture and Markets Law, §§ 300-319; this brief, page 29

[2] Record, page 2.

The unquestioned surplus of wholesome milk in New York State[1] results in competition to obtain buyers. Nebbia is obliged to sell as cheaply as possible to hold his business. This, of course, makes milk more accessible to the buying public in a time of dearth. Under the present law and

[1]Per O'Brien, J., People v. Nebbia (1933) 262 N.Y. 259, 275; R 26. "The markets are, and prior to the passage of this act, were flooded with a plethora of wholesome milk." Counsel for the respondent informs us that he proposes to hand to the Court copies of the "Report of the Joint Legislative Committee to Investigate the Milk Industry" dated April 10, 1933, being 1933 Legislative Document No. 114, and he has kindly furnished us with an advance proof of this interesting paper. The Report makes four points very clear.

(1) That production of milk is now at a point far above the average.
(2) That its wholesome quality is excellent, as evidenced by a new low record (in 1932) for milk-borne diseases.
(3) That with the general economic depression has come a decreased demand for milk, and,
(4) That as the public has much less money to spend, it has turned more and more to stores for milk, which it could, previous to the passage of the Milk Control Law, buy for cash over the counter at substantial savings over the cost of milk delivered on routes.

(1) *As to excess production,* the Report (page 15) says "Since 1927 the number of dairy cows in this state has increased about 10 per cent. The effect of this has been to increase the surplus of milk. Similar increases in the number of cows have occurred generally in the United States and are due to the periodic changes in number of heifer calves raised on farms." At page 16, the Report explains that "highs" and "lows" in the number of heifer calves

Order No. 5, Nebbia was obliged by the Milk Control Board to pay 8c a quart to the dealer who supplied him, and was obliged by pressure of competition caused by surplus milk to sell at 9c a quart. The practical effect is to limit his "mark-up" or gross profit per quart to one cent. He is

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raised to produce milk run in cycles of about fifteen years. At page 39, the Report quotes from Dr. G. F. Warren, of Cornell, who says, "Farmers all over the world raise too many heifers whenever cows pay and raise too few heifers when cows do not pay * * * (page 40). The highest prices ever paid for cows came in 1929. The high prices of cows for 1927 to 1930 resulted in raising too many heifers. These are now cows * * *." Again, at page 77, the Report quotes from Mr. L. A. Van Bomel, President of Sheffield Farms Company, one of the leading distributors of milk in the New York metropolitan market, who said "Very briefly it is our opinion that the present reduction in price is due to the operation of inevitable economic factors and conditions. In the first place, the general price level of commodities the world over had declined. In the second place, there is more milk being produced in the New York milk shed than this market can use in fluid form, with the result that the price has declined. In our opinion, no artificial device can be successfully employed to change the operation of the law of supply and demand."

(2) *As to the wholesome quality* of the milk so produced, the Report, page 28, finds that "the general level of purity and excellence of the milk supply, not only in New York City, but in New York State cities as a whole, is very good". A quotation is given from a statement made in February, 1933, by the New York State Department of Health, to the effect that, "The year 1932 closed with a new low record for milk-borne outbreaks of communicable diseases in the State, exclusive of New York City."

(3) *"The demand for milk and cream has been affected by the reduced purchasing power of consumers."* Report, page 15. "So far as the fluid milk industry in this state is concerned, lower commodity prices have been reflected

equally limited on purchases and sales of pints, and it is noteworthy that Nebbia and the route-dealer each had to charge 6c per pint for milk; but the route-dealer is allowed to give delivery service as a bonus. Nebbia, with a "cash-and-carry" business, can not legally give bread with milk to equalize this advantage.

Without protracting this discussion longer, it seems abundantly demonstrated that the Act as applied by Order No. 5 discriminates unfairly and arbitrarily against Nebbia as a cash-and-carry dealer.

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chiefly in a reduced demand for milk and cream. * * * In the past two years the per capita consumption has fallen off 10 per cent." Report, page 79.

(4) *Sales of milk in stores for a price lower than the "route price" have increased during the economic depression, with a decrease in the trade of the dealers with delivery routes.* Speaking of the New York metropolitan area, the Report, page 163, lists among the causes of increases in sales of bottled milk by stores the lower price as compared with the price on delivery routes, and "the greater necessity at the present time for consumers to save on their purchases of food". This was a substantial saving. "In October, 1931, more than half the cities in the United States of 100,000 or more population had a differential of from one cent to four cents a quart between the route price and the store price of bottled milk * * * In 1932 less than 10 per cent of the stores [in New York City] were getting as much as the retail price on routes, 42 per cent were selling at a discount of one cent, 25 per cent at a discount of two cents, and 20 per cent at a discount of three cents from the route price. The greatest disparity between store prices and route prices was found in Brooklyn and Queens where more than half the stores were selling at a discount of three cents or more per quart from the route price." Report, pages 248, 249.

One more word may be added, however. Under § 301 of the Act,[1] if Nebbia could conceivably buy his milk from a producer (i. e., farmer) who delivers milk only to a dealer, the law might be construed to allow him under Order No. 5 (R 2) to pay the producer whatever price they agreed on, provided Nebbia, as required by § 312-c, would "give fair and reasonable effect to" * * * "the intent of the legislature that * * * the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers". If Nebbia failed in this attempt to follow an indefinite standard, he could be jailed, fined, enjoined, or have his license suspended, under § 312-c of the Milk Control Law.

See

International Harvester Co. v. Kentucky (1914), 234 U. S. 216; 58 L. Ed. 1284,

and

United States v. Cohen Grocery Co. (1921), 255 U. S. 81; 65 L. Ed. 516.

POINT III

The economic depression now affecting the dairy farmers of New York does not suspend the operation of the Fourteenth Amendment.

This brief might well have come to an end with Point II, were it not for the necessity of discussing what certain writers call the "emergency doctrine". Under the cases cited in Points I and II, little can be said in favor of the constitutionality of the act and order fixing retail prices for milk,

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[1] New York Laws of 1933, Ch. 158; Agriculture and Markets Law, Article 25, § 301; this brief page 29.

except that the dairy farmers are in distress and that the present statute is only to operate for a year unless repassed by the 1934 Legislature.

See *Joint Motion To Advance Herein*, pg. 2.

To Nebbia's protest that the State has invaded his established constitutional rights, the State answers, "Yes, but we've only done it for a year, subject to repassage of the bill for an additional year, and so on."

The appellant sees with solemn concern the possible genesis in the case at bar of a doctrine that whenever popular excitement rises high enough to be reflected in temporary legislation which would unquestionably be void if permanent, the stabilizing limitations of the Federal Constitution cease to be operative.

The Fourteenth Amendment was not adopted in fair weather; nor was its operation intended to be limited to times of general content, when no state is pressed to abridge the liberty and property of the individual. Surely the protection of the Constitution does not cease when the need for it is greatest.

In

Ex Parte Milligan (1866), 71 U. S. (4 Wall.) 2, 120; 18 L. Ed. 281, 295,

the Court said,

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just

> and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

See also

United States v. Cohen Grocery Co. (1921), 255 U. S. 81, 88; 65 L. Ed. 516, 520,

and

Sterling v. Constantin (1932), 287 U. S. 378; 77 L. Ed. 254.

Wilson v. New (1917), 243 U. S. 332; 61 L. Ed. 755,

does not support the legislation now in question. That case is an illustration of the power of Congress to regulate common carriers by rail in interstate commerce; the Supreme Court has often pointed out the fact that power to regulate the affairs of the traditional "public utility" does not include power to fix prices or rates in the "common callings" such as those of the dairyman, the grocer, the butcher and the baker.

Nor do the housing cases,

Block v. Hirsch (1921), 256 U. S. 135; 65 L. Ed. 865,

and

Brown Holding Co. v. Feldman (1921), 256 U. S. 170; 65 L. Ed. 877,

support the validity of the Milk Control Law now before this Court. Those decisions undoubtedly went to the very limit of the police power. They were based upon a shortage of houses and a multitude of persons anxious for housing, which allowed a grasping landlord to victimize the tenant for his own profit. The statutes which penalize forestalling, engrossing, usury, and combining to restrain trade express the same policy.

At the opposite extreme is the statute now before the Court. With the State of New York flooded with wholesome milk, the Legislature and Milk Control Board purport to fine and jail anyone who sells it to the public below the price set by order. There is a certain grammatical symmetry in the statement that if a Legislature can provide for fixing a maximum price for houses it can provide for fixing a minimum price for milk; but the resemblance between the two is purely verbal.

In

Wolff Packing Co. v. Court of Industrial Relations (1923), 262 U. S. 522; 67 L. Ed. 1103,

the Supreme Court had before it a case of so-called "emergency" minimum fixing very similar to the present. Under the Kansas Industrial Relations Act, Chapter 29, Laws of Kansas, Special Session, 1920, page 35, the Industrial Relations Court found that an emergency existed in the meat packing business, and therefore fixed the wages to be paid by Wolff Packing Co. The Legislature had declared this business to be affected with a public interest.

In a mandamus proceeding to compel compliance with the mandate of the Industrial Court, the Supreme Court of Kansas held that the emergency contemplated by the stat-

ute existed, and issued the peremptory writ. Burch, J., dissenting from the court's opinion, pointed out

> "So far as it is involved in this case, the act creating the court of industrial relations belongs in the class of statutes beginning to be known in the field of constitutional law as emergency statutes. The court of industrial relations is to do for this state, by means of orders respecting the conduct of essential industries, what Congress did for the United States when it passed the Adamson law, and what the Legislature of New York did for the people of that state when it passed the emergency housing laws."
>
> *Court of Industrial Relations v. Wolff Packing Company* (1922), 111 Kansas, 501, 509.

By writ of error this case came before the United States Supreme Court. In support of the statute argument was made in the brief that the packing business was affected with a public interest, and the existence of an emergency was urged upon this Court. The cases said to uphold the "emergency doctrine",

Wilson v. New (1917), 243 U. S. 332; 61 L. Ed. 755,

Block v. Hirsch (1921), 256 U. S. 135; 65 L. Ed. 865,

and

Brown Holding Co. v. Feldman (1921), 256 U. S. 170; 65 L. Ed. 877,

were all cited as authorities upholding the Kansas legislation. It was pointed out that the order was subject to modification after sixty days, and the Court was urged to hold that for this trial period the Packing Company should have complied with the order fixing the minimum wage.

Thus in 1923 when the *Wolff*[1] decision was handed down, the United States Supreme Court had before it an "emergency" case, where a minimum wage was sought to be fixed. The housing decisions were before the Court. Practically every element which can be urged for the sustaining of the New York Milk Control Law was present in the *Wolff* case.

But the United States Supreme Court held the Kansas statute unconstitutional. The opinion of Chief Justice Taft, writing for the Court, includes these words[2] which might well have been written of the case at bar,—

> "It has never been supposed, since the adoption of of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation."

The Chief Justice then refers to certain businesses which he had previously discussed, which "have come to hold such a peculiar relation to the public that" some government regulation is superimposed upon them, and significantly he lists the *housing* case, *Block v. Hirsch* (1921), 256 U. S. 135; 65 L. Ed. 865, as an example of such a business. Of such businesses he says

> "In nearly all the business included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.
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> In the preparation of food, the changed conditions have greatly increased the capacity for treating the

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[1] Wolff Packing Company v. Court of Ind. Rel. (1923), 262 U. S. 522; 67 L. Ed. 1103.

[2] 262 U. S. 537, 538; 67 L. Ed. 1109, 1110.

raw product, and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above, where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods."

The milk situation in New York is at the pole opposite to monopoly. A great abundance of wholesome milk is for sale by a multitude of dealers and storekeepers, of whom the appellant is one. The statute and order seek arbitrarily to fix prices for this milk at a level higher than the natural abundance would indicate. Such regulation is unconstitutional, and can not stand.

The appellant respectfully submits that the judgment of the Court of Appeals should be reversed.

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APPENDIX

LAWS OF NEW YORK.—By Authority

CHAPTER 158

AN ACT to amend the agriculture and markets law, in relation to milk control during the existing emergency, creating the milk control board and defining its jurisdiction, powers and duties

Became a law April 10, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article twenty-five of chapter forty-eight of the laws of nineteen hundred twenty-two, re-entitled by chapter two hundred and seven of the laws of nineteen hundred twenty-seven, "An act in relation to agriculture and markets, constituting chapter sixty-nine of the consolidated laws," comprising sections two hundred and ninety-two to two hundred and ninety-seven, both inclusive, is hereby renumbered article twenty-six, and such sections are hereby renumbered sections three hundred and fifty to three hundred and fifty-five, respectively, and such chapter is hereby amended by adding a new article, to be article twenty-five, to read as follows:

ARTICLE 25

MILK CONTROL

Section 300. Legislative finding; statement of policy.
301. Definitions.
302. Milk control board.
303. General powers.
304. Rules and orders.
305. Investigations.*
306. Entry and inspection.
307. Violations; remedies.

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* So in original. [Does not conform to section heading.]

308. Licenses to milk dealers; suspension; revocation; review.
309. Records.
310. Reports.
311. Report of receipts.
312. Order fixing price of milk.
313. Legislative intent.
314. Interstate and federal compacts.
315. Reports to governor and legislature.
316. Partial invalidity.
317. Construction, exceptions and limitations.
318. Saving clause.
319. Duration of board.

§ 300. **Legislative finding; statement of policy.** This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale and distribution of milk and milk products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the state of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for industrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local gov-

ernmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing. The foregoing statements of fact, policy and application of this article are hereby declared as a matter of legislative determination.

§ 301. **Definitions.** As used in this article, unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

"Commissioner" means the commissioner of agriculture and markets.

"Board" means the temporary state agency created by this article, to be known as the "Milk control board."

"Director" means the director of the milk control board.

"Person" means any person, firm, corporation or association.

"Milk dealer" means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state except when consumed on the premises where sold. Each corporation which if a natural person would be a milk dealer within the meaning of this article, and any subsidiary of such corporation, shall be deemed a milk dealer within the meaning of this definition. A producer who delivers milk only to a milk dealer shall not be deemed a milk dealer.

"Market" means any city, town or village of the state, or two or more cities and/or towns and/or villages and surrounding territory designated by the board as a natural marketing area.

"Licensee" means a licensed milk dealer.

"Milk" means liquid milk and/or cream fresh, sour or storage; and/or condensed or concentrated whole milk, except when contained in hermetically sealed cans. In each instance where quantity is referred to the intent is to include its whole milk equivalent.

"Producer" means a person producing milk within the state of New York.

"Consumer" means any person other than a milk dealer who purchases milk for fluid consumption.

"Store" means a grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment.

§ 302. **Milk control board.** There shall be in the department of agriculture and markets a milk control board, to consist of the commissioner of agriculture and markets, the commissioner of health, and the director of the milk control board. The commissioner of agriculture and markets and the commissioner of health shall receive no additional compensation for services rendered pursuant to this article, but shall be allowed their actual and necessary expenses incurred in the performance of their duties under this article. The director shall be appointed by the governor and serve during his pleasure. The director shall receive a compensation to be fixed by the governor within the amount available by appropriation. Technical, legal and other services for such board shall be performed, so far as practicable, by forces or officers in the department of agriculture and markets and by forces or officers in the department of health, without additional compensation, but the commissioner may appoint and at pleasure remove such additional technical, legal and other assistants and employees as may be necessary to carry out the provisions of this article, prescribe their powers and duties, and fix their compensation within the amount available by appropriation. The director and the additional technical, legal and other assistants and employees appointed by the board, shall be exempt from civil service examination and the provisions of the civil service law and rules. The commissioner of agriculture and markets shall be the administrative head of the board. Each member of the board shall execute and file with the comptroller a bond conditioned for the safe-keeping and lawful application of moneys coming to the board and under his control in such amount as may be approved by the head of the department of taxation and finance. The commissioner

shall, subject to the limitations of this article and of law, enforce the provisions of this article, but no official act shall be taken, rule or regulation promulgated, or official order made or enforced, with respect to the provisions of this article, without the approval of a majority of the members of the board. The commissioner of agriculture and markets may by official order filed in the office of the department of agriculture and markets designate a deputy, assistant or other subordinate in the department of agriculture and markets, to perform the duties of the commissioner, and the commissioner of health by official order filed in the office of the department of health may designate a deputy, assistant or other subordinate in the department of health to perform the duties of the commissioner of health under this article. The person, if any, designated pursuant to this section, shall have the powers and be subject to the duties and responsibilities of the officer appointing him. Such designation shall be deemed temporary only and shall not affect the civil service or retirement rights of the person designated. The persons so designated shall not receive any additional compensation for the services performed, but shall be allowed their actual and necessary traveling and other expenses incurred in the performance of their duties under this article. The principal office of the board shall be in the city of Albany, in rooms assigned by the superintendent of public buildings, but offices in other localities may be maintained by the board.

§ 303. **General powers**. The board is hereby declared to be the instrumentality of the state for the purpose of attaining the ends recited in the legislative finding, statement of policy and application of article, and is hereby vested with power:

(a) To supervise and regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the state of New York; provided, however, that nothing contained in this article shall be construed to abrogate or affect the status, force or operation of any provision of the public health law, the public service law,

the state sanitary code or any local health ordinance or regulation.

(b) To investigate as the emergency permits and regulate as the emergency requires all matters pertaining to the production, manufacture, storage, transportation, disposal, distribution and sale of milk and milk products in the state of New York. The board shall have the power to subpoena milk dealers, their records, books and accounts, and any other person from whom such information may be desired to carry out the purpose and intent of this article and may issue commissions to take depositions of witnesses absent from the state. Any member of the board or designated employee may sign and issue subpoenas and may administer oaths to witnesses. The provisions of the civil practice act in relation to enforcing obedience to a subpoena lawfully issued by a judge, arbitrator, referee, or other person, or a board or committee, in a matter not arising in an action in a court of record shall apply to a subpoena issued by the board as authorized in this section.

(c) The board may act as mediator and arbitrator in any controversy or issue that may arise among or between milk producers and milk dealers as between themselves or that may arise between them as groups.

(d) The operation and effect of any provision of this article conferring a general power upon the board shall not be impaired or qualified by the granting to the board by this article of a specific power or powers.

§ 304. **Rules and orders.** The board may adopt and enforce all rules and all orders necessary to carry out the provisions of this article. Every rule or order of the board shall be posted for public inspection in the main office of the board and a certified copy filed in the office of the department of state. An order applying only to a person or persons named therein shall be served on the person or persons affected. An order herein required to be served shall be served by personal delivery of a certified copy, or by mailing a certified copy in a sealed envelope with postage prepaided to each person affected thereby, or, in the case of a corporation, to any officer or agent of the corporation

upon whom a summons may be served in accordance with the provisions of the civil practice act. The posting in the main office of the board of any rule, and of any order not herein required to be served, and such filing in the office of the department of state, shall constitute due and sufficient notice to all persons affected by such rule or order. A rule of the board when duly posted and filed as provided in this section shall have the force and effect of law. The provisions of this section as to service of orders shall not apply to orders fixing prices of milk as to which provision is made in section three hundred twelve of this article.

§ 305. **Investigations.** The practice and procedure under this article with respect to any investigation by the board authorized by this article, except as otherwise expressly provided by this article, shall be in accordance with the provisions of article three of this chapter and all of the provisions of such article not inconsistent with the provisions of this article shall apply to such investigation.

§ 306. **Entry and inspection.** Any member of the board or employee designated for the purpose, shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured into food products. Any member of the board or designated employee also shall have power to inspect all books, papers, records or documents in any place within the state for the purpose of ascertaining facts to enable the board to administer this article.

§ 307. **Violations; remedies.** A violation of any provision of this article or of any rule or order of the board lawfully made, except as otherwise expressly provided by this article, shall be a misdemeanor punishable by a fine not exceeding one hundred dollars, or by imprisonment not exceeding one year, or both, and each day during which such violation shall continue shall be deemed a separate violation. The board may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of this article or to enforce compliance with any rule or order of the board made pursuant to the provisions of this article, and in addition to any other remedy may apply to the supreme court in the third judicial dis-

trict, for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that an adequate remedy at law does not exist.

§ 308. **Licenses to milk dealers; suspension; revocation; review.** 1. No milk dealer, as defined in this article, shall buy milk from producers or others for sale within this state, or sell or distribute milk therein unless such dealer be duly licensed as provided in this section, and it shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or, in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this article. The board may by official order exempt from the license requirements provided by this article, milk dealers who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk dealers selling milk in any quantity in markets of one thousand population or less. The board may by official order exempt stores from the license requirements provided by this article where no milk is delivered therefrom to consumers by vehicle.

2. An application for a license to operate as a milk dealer shall be made within thirty days after this article takes effect for the license period commencing May first, nineteen hundred thirty-three and ending March thirty-first following, by mail or otherwise, to the board upon blanks prepared under authority of the board. The applicant shall state the nature of the business to be conducted, the full name of the person applying for the license, and if the applicant be a firm or association, the full name of each member, and if a corporation the names and addresses of all officers and directors, and the city, town or village and the street number, if any, at which the business is to be conducted; facts showing that the applicant has adequate technical personnel, adequate technical and physical facilities to properly conduct the business of receiving and handling milk; that he has complied with all rules and orders of the board filed or served as required in this article, and such other facts with respect to the license as may be required by the board pursuant to this article. Such application shall be accompanied

by the license fee required to be paid by this section. A license shall be granted to the applicant by the board, subject to the provisions of this article.

3. The board may decline to grant a license or may suspend or revoke a license already granted upon due notice and opportunity of hearing to the applicant or licensee, when satisfied of the existence of any of the following:

(a) That a milk dealer has rejected, without reasonable cause, any milk purchased from a producer or has rejected without reasonable cause or reasonable advance notice, milk delivered by or on behalf of a producer in ordinary continuance of a previous course of dealing, except where contract has been lawfully terminated.

(b) That the milk dealer has failed to account and make payment without reasonable cause, for any milk purchased from a producer.

(c) That the milk dealer has committed any act injurious to the public health, public welfare, or to trade or commerce in demoralization of the price structure of pure milk to such an extent as to interfere with an ample supply thereof for the inhabitants of the state affected by this article which is hereby declared to be injurious to the public health, public welfare and to trade and commerce and evidence of a course of conduct on the part of the licensee tending to such demoralization shall be construed to be prima facie evidence of a violation of this section.

(d) Where the milk dealer has made a general assignment for the benefit of creditors or has been adjudged a bankrupt or where a money judgment has been secured against him, upon which an execution has been returned wholly or partly unsatisfied.

(e) Where the milk dealer has continued in a course of dealing of such a nature as to satisfy the board of his inability or unwillingness properly to conduct the business of receiving or selling milk.

(f) Where the milk dealer has been a party to a combination to fix prices, contrary to law. A co-operative

association of dairymen organized under or operated pursuant to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing for its members or shareholders of dairy products produced by its members or shareholders shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monoply* nor shall the contracts, agreements, arrangements or combinations heretofore or hereafter made by such association, or the members, officers or directors thereof, in making such collective sales and marketing and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injurious to public welfare, trade or commerce, if otherwise authorized by such chapter or law.

(g) Where the milk dealer has continued in a course of dealing of such nature as to satisfy the board of an intent to deceive or defraud producers or consumers.

(h) Where there has been a failure either to keep records or to furnish the statements or information required by the board.

(i) Where it is shown that any statement upon which the license was issued is or was false or misleading in any particular.

(j) Where the applicant is a partnership or corporation and any individual holding any position or interest or power of control therein has previously been responsible in whole or in part for any act on account of which a license may be denied, suspended or revoked, pursuant to the provisions of this article.

(k) Where the licensee has violated any of the provisions of this article.

4. A milk dealer receiving during any of the twelve calendar months immediately preceding the period for which the license is issued, a daily average total quantity of milk not exceeding four thousand pounds, shall pay a license fee of twenty-five dollars; a milk dealer receiving a daily aver-

* So in original. [Word misspelled.]

age total quantity of milk of more than four thousand pounds and not exceeding twenty thousand pounds, shall pay a license fee of seventy-five dollars; a milk dealer receiving a daily average total quantity of milk of more than twenty thousand pounds and not exceeding one hundred thousand pounds, shall pay a license fee of two hundred and fifty dollars; a milk dealer receiving a daily average total quantity of milk of more than one hundred thousand pounds, and not exceeding five hundred thousand pounds, shall pay a license fee of seven hundred fifty dollars; a milk dealer receiving a daily average total quantity of milk of more than five hundred thousand pounds, and not exceeding one million pounds, shall pay a license fee of twenty-five hundred dollars; a milk dealer receiving a daily average total quantity of milk of more than one million pounds, shall pay a license fee of five thousand dollars. Milk dealers who have not previously engaged in such business during such prior year shall pay such minimum license fee and in addition thereto, at such time or times as the board may fix, pay an additional sum based upon the daily average total quantity of milk received by such dealers during the license period as fixed by this article. It is not the intent that milk utilized or sold in the form of manufactured products shall be included in the determination of the amount of license fee, but the fluid milk equivalent of cream, and/or condensed or concentrated milk, except when sold in hermetically sealed cans, shall be included in such determination. Sales by a milk dealer of milk outside of the state not involving the receipt or handling or distribution within the state shall not be included in the determination of the license fee.

5. The board may classify licenses and may issue licenses to milk dealers to store, manufacture or sell milk limited to a particular city or village or to a particular market or markets in the state.

6. The official order of the board, in refusing to issue a license, or in suspending or revoking a license, may be reviewed by certiorari in the manner provided by the civil practice act.

§ 309. **Records.** The board may require licensees to keep the following records:

(a) A record of all milk received, detailed as to location, and as to names and addresses of suppliers, with butter fat test, prices paid, deductions or charges made.

(b) A record of all milk sold classified as to grade, location and market outlet and size and style of container, with prices and amounts received therefor.

(c) A record of quantities and prices of milk sold.

(d) A record of the quantity of each milk product manufactured and quantity of milk and/or cream used in the manufacture of each product. Also the quantity and value of milk products sold.

(e) A record of wastage or loss of milk or butter fat.

(f) A record of the items of the spread or handling expense and profit or loss, represented by the difference between the price paid and the price received for all milk.

(g) A record of all other transactions affecting the assets, liabilities, or net worth of the licensee.

(h) Such other records, and information as the board may deem necessary for the proper enforcement of this article.

§ 310. **Reports.** Each licensee shall, from time to time, as required by rule or order of the board, make and file a verified report on forms prescribed by the board of all matters on account of which a record is required to be kept, together with such other information or facts as may be pertinent and material within the scope of the purpose and intent of this article. Such report shall cover a period of time specified in the order.

§ 311. **Report of receipts.** On or before the tenth day of each month, the board shall pay over to the department of taxation and finance, division of finance, all receipts of the board on account of license fees and other moneys received by the board during the preceding month. Such moneys shall be paid into the state treasury, to the credit of the gen-

eral fund. On or before the tenth day of each month the board shall make a verified and detailed report to the department of taxation and finance of all receipts of the board for the preceding month.

§ 312. **Order fixing price of milk.** (a) The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, having special regard to the health and welfare of children, and be most in the public interest. The board shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer.

(b) The board after making such investigation shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state for fluid consumption, and wheresoever produced, including the following classes:

1. By milk dealers to consumers.

2. By milk dealers to stores either for consumption on the premises or resale to consumers.

3. By stores to consumers except for consumption on the premises where sold.

4. When, pursuant to statute, regulations adopted thereunder, or ordinance, various grades of milk are specified, the board shall fix the minimum price and may fix the maximum price applicable to each in each of the foregoing classes. Orders fixing minimum and maximum prices may vary in different markets and shall designate the markets to which applicable.

(c) It is the intent of the legislature that the public emergency requires that the benefits of any increase of prices received by milk dealers by virtue of the minimum price pro-

visions of this section shall be given to producers. To that end, if the board after investigation made either upon its own initiative or upon complaint of a representative group of producers supplying a particular dealer shall determine that such milk dealer purchasing milk from producers or from or through a cooperative corporation of producers organized under or subject to the provisions of chapter seventy-seven of the consolidated laws, in making such purchases has failed to give fair and reasonable effect to such intent, the board shall, upon due notice and after a hearing suspend or revoke the license of the milk dealer so offending and in addition thereto, a violation of this subdivision shall render such offending milk dealer subject to the provisions of section three hundred seven of this article.

(d) The board after making such investigation either on its own initiative or on complaint of a representative group of producers supplying a particular dealer or a particular market may fix by official order the minimum prices to be paid by milk dealers to producers and others for milk of the various forms included within the definition of milk as used in this article and its various grades and uses. The order of the board with respect to the minimum prices to be paid to the producers and others shall apply to the locality or zone in which the milk is produced, the market or markets in which the milk so produced is sold and may vary in different localities or markets according to varying uses and differing conditions. Each such order may classify such milk by forms, classes, grades or uses as the board may deem advisable and may specify the minimum prices therefor.

(e) After the board shall have fixed prices to be charged or paid for milk in any form included in the definition of milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price, or prices as shall be applicable to the particular transaction, whether by any discount, or

rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise, except as provided in subdivision c of section three hundred and seventeen of this article.

(f) The board may upon its own motion or upon application from time to time alter, revise or amend an official order theretofore made with respect to the prices to be charged or paid for milk. After making such investigation and before making, revising or amending any order fixing the price to be charged or paid for milk, the board shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the public of such hearing in such newspaper or newspapers as in the judgment of the board shall afford sufficient notice and publicity. Such order of the board may be reviewed by certiorari order at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order.

(g) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article on the board shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful.

§ 313. **Legislative intent.** It is the intent of the legislature that no provision of this article shall prevent, and no provision contained therein shall be deemed or construed to prevent a cooperative corporation, organized or operated

under or subject to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing of milk for the producers thereof, from blending the net proceeds of all its sales in various classes and whether in fluid form or as manufactured products, both within and without the state, and paying its producers such blended price, with such deductions and/or differentials as may be authorized under contract between such corporation and its producers, or from making collective sales of the milk of its members and/or other producers represented by it, at a blended price based upon sales thereof in the various classes, and whether in fluid form or as manufactured products, both within and without the state, and which price is to be paid either directly to the producers or to the cooperative corporation. Nothing herein contained shall prevent any milk dealer from contracting for his milk with such cooperative corporation upon such basis. Also that no provision of this article shall be deemed or construed to affect the contracts of such a cooperative corporation with its producers nor to affect or abridge the rights and powers of such a corporation conferred by the provisions of such chapter or any of its operations thereunder, except as in this article otherwise provided.

§ 314. **Interstate and federal compacts.** The board is hereby vested with authority to confer with legally constituted authorities of other states and of the United States, with respect to a uniform milk control within the states and/or as between states, and may enter into a compact or compacts for such uniform milk control, subject to such federal approval as may be required by law.

§ 315. **Reports to governor and legislature.** The board shall, when requested, make reports of its proceedings to the governor and to the chairman of the finance committee of the senate and the chairman of the ways and means committee of the assembly.

§ 316. **Partial invalidity.** If any clause, sentence, paragraph or part of this article shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the re-

mainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered.

§ 317. **Construction, exceptions and limitations.** (a) The licenses required by this article shall be in addition to any other license required by this chapter or otherwise required by law, and this article shall apply to the city of New York, but shall not be construed to conflict, alter or repeal laws now in force relating to the board or department of health of the city of New York, nor the sanitary code now in force in such city or any amendments thereof duly adopted, nor shall any provisions of this article or any regulations adopted thereunder, relating to matters of health, sanitation or purity or wholesomeness of milk which is in conflict with the sanitary code or the regulations of the board of health of the department of health of the city of New York, apply to the city of New York or to the production and transportation of milk for said city.

(b) This article shall not apply to certified milk, nor to milk sold to the state or any municipality or to the federal government upon bids.

(c) It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city.

§ 318. **Saving clause.** No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto.

§ 319. **Duration of board.** The board shall continue with all the powers and be subject to all the duties and responsibilities prescribed by this article until March thirty-first, nineteen hundred thirty-four, at which time the board shall be deemed abolished and the powers, duties and jurisdiction conferred or imposed upon the board by this article shall terminate. All books, papers, records and documents in the possession of the board when terminated shall be delivered to the department of agriculture and markets.

§ 2. This act shall take effect immediately.

STATE OF NEW YORK,
Department of State. } *ss:*

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

EDWARD J. FLYNN,
Secretary of State